



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 4, 2005

Ms. Stephanie Bergeron Perdue  
Director  
Environmental Law Division  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2005-01076

Dear Ms. Perdue:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 218047.

The Texas Commission on Environmental Quality (the "commission") received a request for all records maintained by the commission regarding 32 named facilities. You state that the submitted information may be confidential under section 552.101 or section 552.110 of the Government Code, but make no arguments and take no position as to whether the information is so excepted from disclosure. You state and provide documentation showing that you have notified Metal Prep, Inc. ("Metal Prep") and Jones-Blair Company, Inc. ("Jones-Blair"), third parties whose proprietary interests may be implicated, of the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that you have only submitted records pertaining to one of the facilities for which information was requested. We assume that, to the extent any additional responsive information existed on the date of the commission's receipt of this request, you have released

it to the requestor. If not, then you must do so immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000).

We next address the commission's obligations under section 552.301 of the Government Code. Section 552.301(e) of the Government Code provides that a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You state that the commission received the request for information on November 12, 2004. The commission sent a second set of responsive documents that was received by this office on January 3, 2005. As this second set of documents was sent after the fifteen-business-day deadline imposed under section 552.301(e), the commission failed to comply with section 552.301 with respect to the second set of documents.

Pursuant to section 552.302, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Here, because third party interests are implicated, we will consider whether any of the requested information must be withheld to protect third party interests.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Metal Prep has not submitted comments to this office in response to the section 552.305 notice; therefore, we have no basis to conclude that this company has a proprietary interest in the submitted information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, the commission may not withhold any portion of the submitted information on the basis of any proprietary interest Metal Prep may have in the information. However, this office has received a response from counsel for Jones-Blair objecting to the release of certain information pursuant to sections 552.101 and 552.110.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't

Code § 552.101. This exception protects information that another statute makes confidential. The commission believes that the submitted information may be confidential under section 382.041 of the Health and Safety Code. Section 382.041 provides in relevant part that “a member, employee, or agent of [the commission] may not disclose information submitted to [the commission] relating to secret processes or methods of manufacture or production that is identified as confidential when submitted.” Health & Safety Code § 382.041(a). This office has concluded that section 382.041 protects information that is submitted to the commission if a *prima facie* case is established that the information constitutes a trade secret under the definition set forth in the Restatement of Torts and if the submitting party identified the information as being confidential in submitting it to the commission. *See* Open Records Decision No. 652 (1997).

Section 552.110 of the Government Code protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.<sup>1</sup> *Id.* This office has held that if a

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<sup>1</sup> The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. See Open Records Decision No. 402 (1983).

Upon review, we find that Jones-Blair has made a *prima facie* case that the information it has designated meets the definition of a trade secret and has demonstrated the factors necessary to establish a trade secret claim. Moreover, we have received no arguments that would rebut this case as a matter of law. We therefore conclude that the commission must withhold the marked information pursuant to section 552.110(a) of the Government Code.

However, under the Federal Clean Air Act, emission data must be made available to the public, even if the data otherwise qualify as trade secret information. See 42 U.S.C. § 7414(c). Thus, to the extent that the documents contain any information that constitutes emission data for purposes of section 7414(c) of title 42 of the United States Code, the commission must release that information in accordance with federal law. As no additional exceptions are claimed, the remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

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(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

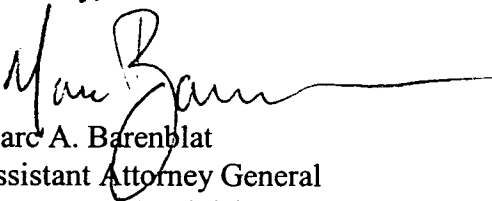
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

  
Marc A. Barenblat  
Assistant Attorney General  
Open Records Division

MAB/sdk

Ref: ID# 218047

Enc. Submitted documents

c: Mr. Jeremiah J. Anderson  
King & Spalding, L.L.P.  
1100 Louisiana, Suite 4000  
Houston, Texas 77002  
(w/o enclosures)

Mr. Errol Cha  
Manager of Engineering  
Jones Blair Company  
P.O. Box 35286  
Dallas, Texas 75235  
(w/o enclosures)

Mr. John Hill  
Plant Manager  
Metal Coaters Operators L.P. d/b/a Metal Prep, Inc.  
501 North Greenwood Street  
Houston, Texas 77011-1115  
(w/o enclosures)